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No. 09-1149

In the Supreme Court of the United States

CITY OF WARREN ET AL.,

Petitioners,

v.

JEFFREY MICHAEL MOLDOWAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION OF NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, ASSOCIATION OF PROSECUTING ATTORNEYS, AND MICHIGAN TOWNSHIPS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, ASSOCIATION OF PROSECUTING ATTORNEYS, AND MICHIGAN TOWNSHIPS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici the National Association of Police Organizations, Inc. ("NAPO"), the Michigan Association of Chiefs of Police ("MACP"), the Association of Prosecuting Attorneys ("APA"), and the Michigan Townships Association ("MTA") respectfully move, pursuant to Rule 37.2(b) of the Rules of this Court, for leave to file a brief *amicus curiae* in support of petitioners. This motion is necessary because on May 3, 2010, counsel for respondent Moldowan declined the timely written request for consent to the filing of this brief.

The NAPO is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action, and education. Founded in 1978, the NAPO now represents more than 2,000 police units and associations, 241,000 sworn law enforcement officers, 1,000 retired officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

The MACP, founded in 1924, represents over 1,000 police chiefs, directors of public safety, and command officers from village, township, city, county, state and federal law enforcement agencies. It seeks to advance the science of police administration, foster police cooperation, provide training and educa-

tion, and encourage legislation for the benefit of the citizens of State of Michigan and law enforcement in general.

The APA is a national organization that represents all prosecutors. It provides resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make communities safer. The APA acts as a forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal justice partners. The APA also advocates for prosecutors on issues related to the administration of justice.

The MTA is a Michigan non-profit corporation whose membership consists of more than 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, information, and guidance to and among township officials to enhance efficient and knowledgeable administration of township government services under Michigan laws and statutes.

Amici believe that their views will provide a useful supplement to the presentations of the parties. A clear, consistent interpretation of the liability standard for police officers with respect to their duty to inform prosecutors about potentially exculpatory evidence is of paramount importance to *amici*'s members. In particular, the law enforcement officers whom *amici* represent need this Court's guidance on the circumstances that may lead to personal liability for alleged violations of criminal defendants' constitutional right of due process. Previously, such liability has required, at a minimum, some kind of intentional conduct.

Amici are greatly concerned by the holding of the Sixth Circuit that a police officer can be found liable for damages for failing to disclose evidence with "apparent" exculpatory value *irrespective of the officer's mental state*. Under the Sixth Circuit's standard, a negligent or inadvertent failure to disclose evidence is just as culpable as a deliberate or bad-faith failure to disclose. This is an unprecedented expansion of the scope of state actors' liability under 42 U.S.C. § 1983, which previously has provided for liability only where the challenged conduct was more than negligent. Moreover, the Sixth Circuit's negligence standard complicates a legal landscape in which the circuit courts already have divergent views on the appropriate standard. This Court's intervention is necessary to impose a uniform nationwide standard.

Respectfully submitted.

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BRIEF OF NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, ASSOCIATION OF PROSECUTING ATTORNEYS, AND MICHIGAN TOWNSHIPS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

As set forth in the accompanying motion, *amici* are organizations that seek to advance effective law enforcement techniques and protect the interests of law enforcement officials and municipalities.

The NAPO is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action, and education. Founded in 1978, the NAPO now represents more than 2,000 police units and associations, 241,000 sworn law enforcement officers, 1,000 retired officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

The MACP, founded in 1924, represents over 1,000 police chiefs, directors of public safety, and command officers from village, township, city, county, state and federal law enforcement agencies. It seeks to advance the science of police administration,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. Respondent Moldowan denied consent through counsel on May 3, 2010.

foster police cooperation, provide training and education, and encourage legislation for the benefit of the citizens of State of Michigan and law enforcement in general.

The APA is a national organization that represents all prosecutors. It provides resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make communities safer. The APA acts as a forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal justice partners. The APA also advocates for prosecutors on issues related to the administration of justice.

The MTA is a Michigan non-profit corporation whose membership consists of more than 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, information, and guidance to and among township officials to enhance efficient and knowledgeable administration of township government services under Michigan laws and statutes.

SUMMARY OF ARGUMENT

Thirteen years after the abduction and brutal assault of Maureen Fournier, a witness at the re-trial of Jeffrey Moldowan, one of the alleged assailants, stated for the first time that shortly after the assault he gave a statement to an unidentified police officer. The witness, Jerry Burroughs, allegedly told the officer that he had observed four African-American males standing over Fournier's injured body in a Detroit street on the night she was abducted from neighboring Warren. No such statement ever

reached the files of the prosecutors in the case against Moldowan, a Caucasian who was convicted in 1991. Moldowan's conviction was vacated after new evidence came to light and key trial testimony was recanted, and he was ultimately acquitted in a second trial.

Burroughs—who does not claim to have witnessed the kidnapping or the assault—never identified, and admits that he cannot now identify, the officer to whom he says he gave his statement. But more than a decade after the events Moldowan asks a federal court to infer that it was Detective Donald Ingles of the Warren Police Department, against whom he has asserted civil claims. Based on that unsupported inference and the facts described above, the Sixth Circuit held that Ingles does not have qualified immunity for allegedly failing to bring Burroughs's statement to the attention of prosecutors. According to the Sixth Circuit, it is a clearly established rule of constitutional law that "[w]here the exculpatory value of a piece of evidence is 'apparent,' the police have an *unwavering* constitutional duty to preserve and ultimately disclose that evidence." Pet. App. 63a. The Sixth Circuit further held that no showing of bad faith by the officer is required: a due-process violation may be established by a merely negligent or innocent failure to bring evidence to a prosecutor's attention. *Id.* at 63a-64a.

The Sixth Circuit thereby created a new rule that conflicts with the law set forth by this Court and followed by four other circuits. If allowed to stand, this rule will lead to an upsurge of constitutional litigation against police officers, as well as a massive new risk for municipalities of claims blaming them for innocent or merely negligent conduct by officers.

Such a result would place an enormous burden on police officers, who are on the front lines of investigating crimes and ensuring that justice is done. The scope of police officer liability with respect to potentially exculpatory evidence is an important and recurring issue, and this Court's intervention is necessary to confirm the appropriate standard.

ARGUMENT

This Court should grant the petition and correct the Sixth Circuit's erroneous view of the standard governing civil liability of a police officer under 42 U.S.C. § 1983 on a due process claim of withholding exculpatory evidence.

The Sixth Circuit's standard, which imposes liability on an officer regardless of bad faith or intent in failing to disclose "apparently" exculpatory evidence to prosecutors, conflicts with the longstanding principle that a constitutional violation requires conduct more culpable than simple negligence.

The Sixth Circuit's passing suggestion that Ingles would not be entitled to summary judgment even under a bad-faith standard is equally unsupportable. The record in this case shows negligence at most, making the Sixth Circuit's refusal to require proof of bad faith decisive with respect to whether respondent's claims against Ingles may proceed.

A police officer's liability for withholding potentially exculpatory evidence is an important and recurring issue on which this Court's guidance is needed. Given the frequency with which the issue arises, allowing the Sixth Circuit's decision to stand would lead to a flood of new litigation against police officers and impose an enormous financial burden on the municipalities that employ and indemnify them.

Just as troubling, this risk of increased liability would have a chilling impact on the exercise of municipal law enforcement.

I. The Sixth Circuit's New Standard Cannot Be Squared With This Court's Precedents.

The Sixth Circuit's decision contravenes this Court's unequivocal teaching that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels* v. *Williams*, 474 U.S. 327, 328 (1986); see *County of Sacramento* v. *Lewis*, 523 U.S. 833, 849 (1998) ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"). Contrary to these clear pronouncements, the Sixth Circuit would allow liability "regardless [of] whether a *** § 1983 plaintiff can show that the evidence was destroyed or concealed in 'bad faith'" (Pet. App. 63a-64a)—which is to say, even if the destruction or concealment was innocent or negligent. See also Pet. App. 53a (the "critical issue *** emphatically is not the mental state of the government official who suppressed the evidence").

Whether the law requires a plaintiff to allege and prove bad faith or simply negligence is no small issue. This Court has consistently refused in a variety of contexts to adopt a strict liability or negligence standard for constitutional violations by police officers or other state actors.

For example, this Court held last term that the exclusionary rule does not apply to evidence obtained in violation of the Fourth Amendment where the police conduct was merely negligent. *Herring* v. *United States*, 129 S. Ct. 695, 702 (2009). As the Court explained, "police conduct must be sufficiently delib-

erate that exclusion can meaningfully deter it. *** [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Ibid.* See also *United States* v. *De Leon-Reyna*, 930 F.2d 396, 397 (5th Cir. 1991) (en banc) (negligent police conduct did not "truncate[] the good faith exception to the exclusionary rule").

This Court similarly has refused to permit constitutional claims based on mere negligence for violations of the Eighth Amendment by prison officials, instead requiring "deliberate indifference." *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994); *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976). In *Estelle*, which first set forth the "deliberate indifference" standard, the Court explained that "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim." 429 U.S. at 106; see *id.* at 105-106 ("an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind'"). In *Farmer*, the Court further clarified that to be liable, an official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 511 U.S. at 837. Under this standard, negligent conduct *cannot* lead to liability. See *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986) ("To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve *more than ordinary lack of due care* for the prisoner's interests or safety") (emphasis added).

The lower courts have followed this clear directive. *Gayton* v. *McCoy*, 593 F.3d 610 (7th Cir. 2010)

("Evidence that the official acted negligently is insufficient to prove deliberate indifference"); *Hernandez* v. *Keane*, 341 F.3d 137, 144 (2d Cir. 2003) ("'Deliberate indifference' describes a mental state more blameworthy than negligence"); *McElligott* v. *Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) (deliberate indifference is "conduct that is more than mere negligence"). The same is true when the claim lies under the Fourteenth, rather than the Eighth, Amendment. *E.g.*, *Pabon* v. *Wright*, 459 F.3d 241, 251 (2d Cir. 2006) ("simple negligence will not suffice").

Likewise, negligent use of excessive force is insufficient to establish a violation of the Fourth Amendment's prohibition on unreasonable seizures. *Brower* v. *County of Inyo*, 489 U.S. 593, 596 (1989) (seizure must be "willful" to violate Fourth Amendment); *McCoy* v. *City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005) ("A Fourth Amendment seizure requires an intentional act by an officer"); *Howerton* v. *Fletcher*, 213 F.3d 171, 175 n.4 (4th Cir. 2000) ("the exertion of force amounting to a Fourth Amendment seizure [must] be *intentional*"); *Apodaca* v. *Rio Arriba County Sherriff's Dept.*, 905 F.2d 1445, 1447 (10th Cir. 1990) ("one seized unintentionally does not have a constitutional complaint"); *Gutierrez* v. *Mass. Bay Transp. Auth.*, 772 N.E.2d 552, 558 (Mass. 2002) ("An accidental use of force, even if occurring during the course of an arrest or other physical restraint of a person, does not constitute a seizure because it is not a 'means intentionally applied' to obtain control of the arrestee").

Nor is negligence, or anything close to it, sufficient to state a claim under substantive due process against the police; rather, a plaintiff must allege conduct that shocks the conscience. "It should not be

surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability." *Lewis*, 523 U.S. at 848; see *Walter* v. *Pike County*, 544 F.3d 182, 193 (3d Cir. 2008) (officers' "approval of the arrest plan was at most negligent, and does not shock the conscience"); *King ex rel. King* v. *E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007) (to shock the conscience "in all cases, the conduct must be more culpable than mere negligence"); *Moore* v. *Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006) ("It is well settled that negligence is not sufficient to shock the conscience"); *Roach* v. *City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (officer's "negligence in pursuing" vehicle "does not rise to the level of gross negligence and, therefore, most certainly does not rise to the level of conduct which would sustain a claim under section 1983"); *Dunster* v. *Metro. Dade County*, 791 F.2d 1516, 1518 (11th Cir. 1986) ("Because the plaintiffs' case was premised on a theory of negligence, the jury verdict cannot be sustained under the Fourteenth Amendment").

In short, the law as set forth by this Court and followed by the lower courts is clear and well established: only *deliberate* conduct can violate the Constitution. The Sixth Circuit's unprecedented expansion of liability for constitutional torts cannot be reconciled with existing law, which relegates negligence to the sphere of common-law tort claims. State actors should not be subject to the threat of personal liability under § 1983 for their innocent mistakes or negligent acts.

II. Application Of The Proper Standard In This Case Would Require Summary Judgment For Detective Ingles.

After creating a new standard for constitutional claims against police officers, the Sixth Circuit ultimately hedged its bet by suggesting in passing that, even under a bad-faith standard, "a jury could reasonably conclude that Detective Ingles acted in bad faith." Pet. App. 65a. The court thus implied that its wholesale revision of the law was of little consequence because the outcome would be the same either way. In fact, the Sixth Circuit's new "negligence is sufficient" standard was dispositive because here, as in many cases, the record plainly would require summary judgment for the officer under the proper standard.

Moldowan contends that Ingles failed to disclose to prosecutors a statement that Burroughs allegedly gave about a month after the assault to an unknown police officer who was canvassing his parents' neighborhood for leads. According to Burroughs, on the night of Fournier's assault, he observed four African-American men standing over a naked woman on a Detroit street and then driving away. Pet. App. 10a. Burroughs also says that he later heard two of the same men bragging about the assault, and that (contrary to her testimony at Moldowan's first trial) Fournier frequented a crack house in the same Detroit neighborhood. Pet. App. 10a.

Burroughs's testimony about his observations appears at the following points in the record: the handwritten affidavit procured by the Moldowan family's private investigator in November 1991, after Moldowan's first trial; a second affidavit prepared more than eight years later; Burroughs's live testi-

mony at Moldowan's retrial in January 2003; and his 2006 deposition in these civil proceedings. In all this, Burroughs *never* identifies Detective Ingles as the police officer to whom he spoke; indeed, Burroughs did not tell anyone that he had talked to police until he was on the stand at Moldowan's re-trial.

- Burroughs's two-sentence 1991 affidavit does not mention that he ever told police about his observations. Burroughs Aff. 11/6/91.
- Burroughs's 1999 affidavit again fails to mention that he ever spoke with police about what he allegedly observed. Indeed, it attests that Burroughs was "too afraid" to assist the woman he saw or call 911. Burroughs Aff. 4/5/99.
- At Moldowan's retrial, Burroughs testified for the first time that "a month or so" after Fournier's assault, he spoke to police who were "in the neighborhood trying to see *** what they could find out." He said he told a male officer his "story," and "he just acted like I [was] saying nothing." He did not know the officer's name or even whether he was from Detroit or Warren. Re-trial Tr. 92-93.
- In his deposition in this civil case, Burroughs elaborates for the first time that a "white," "plainclothed" detective "of the Warren Police Department," who appeared to be in his "early forties," interviewed him at his mother's home about a month after Fournier's assault. Burroughs Dep. 34-36. Though the detective asked if Burroughs

> knew anything about the incident, the detective "acted like he didn't want to hear it," "didn't write down anything," and did not ask Burroughs for his name or contact information. *Id.* at 37, 127-28. Burroughs acknowledges that he previously told his story to a private detective, Mr. Spencer, hired by the Moldowan family. *Id.* at 47-48. On the three occasions he spoke with Spencer beginning in 1991, Burroughs never mentioned that he had talked to the police. He "forgot about it until we went to court"—nearly 13 years after the alleged conversation took place. *Id.* at 130; see *id.* at 48, 56.

According to the Sixth Circuit, this tissue-thin evidence provides a sufficient basis on which a jury could conclude that (1) Burroughs spoke to a police officer in connection with the crimes against Fournier; (2) the officer to whom Burroughs allegedly spoke was Detective Ingles and not any other officer from Detroit or Warren who investigated the Fournier assault; and (3) Ingles withheld Burroughs's statement from prosecutors, despite its "apparent" exculpatory value, out of "bad faith" rather than inadvertent or negligent conduct. The Sixth Circuit did not explain its suggestion that such inferences could be plausible based on this record.

Even if one assumes (as Ingles has for the limited purpose of summary judgment) that he spoke to Burroughs in 1991 and never relayed Burroughs's statements to prosecutors, there is not a scintilla of evidence that Ingles acted in bad faith. The Sixth Circuit certainly did not point to any, instead simply invoking "Burroughs' testimony, taken as a whole."

Pet. App. 65a. But given that Burroughs cannot even identify the officer with whom he allegedly spoke, his testimony alone cannot illuminate Detective Ingles's state of mind. Nor can bad faith be inferred from the simple fact that prosecutors were unaware of Burroughs's alleged statement. "Bad faith" in the context of withholding evidence entails the "inten[t] to deprive the defendant of a fair trial." *White* v. *McKinley*, 519 F.3d 806, 814 (8th Cir. 2008). Further, under *any* standard requiring more than negligence, whether dubbed "bad faith" or not, the Sixth Circuit's conclusion could not stand. See *Tennison* v. *City & County of San Francisco*, 570 F.3d 1078, 1088 & n.5 (9th Cir. 2009) (officer must have "acted with deliberate indifference to or reckless disregard for the accused's rights or for the truth"); *Porter* v. *White*, 483 F.3d 1294, 1307-1308 (11th Cir. 2007) (negligence is insufficient); *Hart* v. *O'Brien*, 127 F.3d 424, 446-447 (5th Cir. 1997) (officer must "*deliberately* fail[] to disclose" evidence that is "*patently* exculpatory") (emphasis added), abrogated on other grounds, *Kalina* v. *Fletcher*, 522 U.S. 118 (1997).

Burroughs's testimony, even "taken as a whole," says nothing that could support the conclusion that Ingles (assuming Burroughs actually spoke to an officer and that the officer was Ingles) *deliberately* withheld evidence from prosecutors or *intended* to deny Moldowan a fair trial. At most it could be inferred that the officer *neglected* to inform prosecutors that he spoke to Burroughs—who by his own account did not witness the crimes and "didn't want to talk about this matter" with police. Burroughs Dep. 38. Especially given the victim's confident and specific identification of her attackers (including Moldowan) before and at Moldowan's first trial, Pet. App. 6a-8a, bad faith seems a dubious hypothesis for a police of-

ficer's failure to forward the vague statement of a reticent non-witness about the same events—if indeed such a statement was made.

It is the plaintiff's burden to establish that something more than negligence was at play, a burden that could not be met on this record. Accordingly, and contrary to the Sixth Circuit's suggestion, the court can have rejected Ingles's entitlement to summary judgment *only* under its newly minted "negligence is sufficient" standard. And, because that standard does not pass muster under this Court's precedents, the Sixth Circuit's decision must be reversed.[2]

III. Police Officers' Liability For Withholding Exculpatory Evidence Is An Important And Recurring Issue.

This Court's intervention is further and immediately needed to stem an inevitable tide of new litigation against police officers and the chilling of their pursuit of their law enforcement duties.

Section 1983 claims against police officers for allegedly withholding potentially exculpatory evidence from prosecutors are not uncommon. But two primary bulwarks have prevented such litigation from overwhelming the resources of police departments and municipalities. First, this Court has made clear that the duty to obtain and disclose exculpatory evi-

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[2] At the very least, for purposes of qualified immunity, the right to evidence of "apparent" exculpatory value negligently withheld by police officers was not clearly established in 1991, the time of the investigation and first trial. "Retroactive application of fresh precedent has no place in fixing the standard of conduct for damage suits under Section 1983." *Slate* v. *McFetridge*, 484 F.2d 1169, 1174 (7th Cir. 1973).

dence lies solely with the prosecution. *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995). Prosecutors, of course, are immune from civil liability for conduct in the course of their official duties. *Imbler* v. *Pachtman*, 424 U.S. 409, 427 (1976). The Sixth Circuit's decision circumvents *Kyles* by imposing what the majority called a "derivative" duty on police officers. Pet. App. 38a. Indeed, the Sixth Circuit would impose greater burdens on police than on prosecutors, because prosecutors must disclose only "material" evidence while police would be required to disclose evidence of "apparent" exculpatory value. Pet. App. 62a.

Second, even where courts have considered § 1983 claims against officers based on exculpatory evidence, requiring the plaintiff to show bad faith or deliberate misconduct allows unwarranted claims to be resolved quickly. *E.g.*, *McLain* v. *City of Ridgeland*, 2010 WL 780532, at *8 (S.D. Miss. Feb. 28, 2010) (granting judgment as a matter of law for defendant where, if any information was withheld from prosecutor, "it was due, at the very worst, to negligence"); *Rosales* v. *Kikendall*, 677 F. Supp. 2d 643, 649 n.2 (W.D.N.Y. 2010) (assuming *Brady* applies to prison disciplinary proceedings, dismissal granted absent allegation that defendant failed to disclose evidence "with the intent of denying plaintiff a fair hearing"); *Windham* v. *Graham*, 2008 WL 3833789, at *7 (D.S.C. Aug. 14, 2008) (dismissing pretrial detainee's claim that "police negligently failed to include [in investigative file] the evidence Plaintiff seeks"); *Moore* v. *Higgins*, 2008 WL 2225724 (E.D. Mo. May 29, 2008) (granting summary judgment on due-process claim where no showing that officer "acted with the intent to deprive Plaintiff of a fair trial"); *Ihekoronye* v. *City of Northfield*, 2008 WL 906206, at *7 (D. Minn. Mar. 31, 2008) (granting

summary judgment where "[u]ltimately, there is a total lack of any bad faith, as required for a procedural due process violation").

Still, requiring alleged bad faith by an officer has not been an unreasonable barrier for plaintiffs. Courts have allowed cases to proceed where an officer's withholding of evidence was allegedly deliberate misconduct. *E.g.*, *Glass* v. *City of Gainesville*, 2009 WL 2632801, at *4 (E.D. Tex. Aug. 25, 2009) (denying motion to dismiss reckless-investigation claim where plaintiff alleged officers "deliberately" ignored exculpatory evidence); *Friedman* v. *New York City Admin. for Children's Servs.*, 2009 WL 2222803, at *5 (E.D.N.Y. July 21, 2009) (denying summary judgment and qualified immunity where plaintiff raised question of fact whether defendant "deliberately failed to disclose" material facts); *Hernandez* v. *City of El Paso*, 662 F. Supp. 2d 596, 617-620 (W.D. Tex. 2009) (denying summary judgment on claim that defendants deliberately concealed exculpatory evidence); *Smith* v. *Short*, 2008 WL 5043917, at *6 (D. Or. Nov. 21, 2008) (denying summary judgment where defendant's "failure to disclose [exculpatory] facts could be viewed as deliberate, as opposed to negligent").

As these recent cases demonstrate, to the extent that § 1983 claims against police officers are cognizable at all in light of *Kyles*, the bad-faith standard strikes a balance that allows claims of deliberately unconstitutional conduct to proceed while protecting officers from personal liability for mere negligence. Importing a negligence standard into due process would impose intolerable new legal and financial burdens on police departments and municipalities. *Every* case involving the alleged withholding of evi-

dence—innocent, negligent, deliberate, or otherwise—would proceed past the motion-to-dismiss stage and to discovery. A plaintiff's inability to allege or prove bad faith or deliberate conduct by the police officers would *never* lead to dismissal or summary judgment. The plaintiff's burden would simply be to allege and show that some potentially exculpatory evidence *existed* but did not reach the prosecutor's files. The potential burden on local governments to defend against such claims, given their frequency, is unfathomable.

And this says nothing of the increased litigation that will be spurred by the Sixth Circuit's "apparently exculpatory" standard for triggering a police officer's constitutional obligation to forward evidence to prosecutors. This Court favors clear rules for police officers, not "difficult judgment calls" about what are ultimately questions of law. *Davis* v. *United States*, 512 U.S. 452, 461 (1994) ("The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information"). What constitutes "apparently" exculpatory evidence is hardly a bright line and will give rise to countless pages of briefs and conflicting judicial decisions for years to come. In the meantime, police officers will risk personal liability for damages every time they are forced to make the essentially legal determination of whether a piece of evidence has "apparent" exculpatory value. This impractical, unworkable—and, in light of the existing obligation on prosecutors, unnecessary—standard propounded by the Sixth Circuit all but guarantees an untenable increase in litigation.

Finally, this Court should grant the petition to prevent the chilling of vigorous police work for fear of personal liability. Police officers should be encouraged to pursue all avenues in investigating reported crimes, unhampered by the fear that if they inadvertently fail to alert prosecutors to a single piece of evidence, the exculpatory value of which becomes "apparent" in hindsight, they will be personally responsible for tort damages. The perverse incentive structure such a rule imposes is evident: police officers might rationally avoid avenues that could yield potentially exculpatory evidence. After all, an officer cannot be found liable for failing to disclose evidence that he never finds. Moreover, an officer who comes to realize that she inadvertently omitted mention of some witness or piece of physical evidence in a report to prosecutors might never step forward to correct the omission, knowing that the oversight could support an award of damages. Fairness demands that a police officer not be forced to choose between admitting civil liability and doing justice.

* * *

The need for this Court's intervention is clear and urgent. District courts in the Sixth Circuit are already relying on the decision below. *E.g.*, *Hatchett* v. *City of Detroit*, 2010 WL 538648, at *10 (E.D. Mich. Feb. 10, 2010); *United States* v. *Tucker*, 2009 WL 4796471, at *2 (W.D. Mich. Dec. 9, 2009). It is critical that this Court take swift action to right the ship.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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